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No. 98-

In The

Supreme Court of the United States

October Term, 1997

MICHAEL C. GOLD,

Petitioner,

vs.

CITY OF MIAMI, a Florida municipal corporation; CALVIN ROSS, Individually; RAFAEL SUAREZ, Individually; JORGE PEREZ, Individually; and WILLIAM CAMPBELL, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In holding that the individual defendant police officers had qualified immunity from personal liability under 42 U.S.C. § 1983, for their concededly illegal arrest of Plaintiff Michael Gold for criticizing them without causing or threatening a disturbance, whether the Court of Appeals:

1) applied the wrong legal standard, in conflict with the decisions of this Court, in its application of the "clearly established" test of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); and

2) created conflict with the decisions of at least five other Courts of Appeals on analogous facts.

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PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the district court, denying both the plaintiff's and the individual officers' motions for summary judgment on the issue of qualified immunity, is not reported, and is reprinted in the appendix at App. 11. The panel opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 121 F. 3d 1442, and is reprinted in the appendix at App. 1. The order of the Court of Appeals denying rehearing en banc, with the dissenting opinion of the Honorable Rosemary Barkett, is reported at 138 F. 3d 886, and is reprinted in the appendix at App. 14.

JURISDICTION

The Court of Appeals entered its judgment on September 17, 1997 (App. 1). The petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied April 7, 1998 (App. 14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment, United States Constitution, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Fourth Amendment, United States Constitution, provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . "

The Fourteenth Amendment, United States Constitution, provides in relevant part: " . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

Section 1983, Title 42, United States Code, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Colombia, subjects, or causes to be subjected, any citizen in the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. The Proceedings Below.

This case concerns the viability of a § 1983 action for the illegal arrest of Petitioner Michael Gold, a Florida

attorney, for loudly and profanely criticizing some Miami police officers for failing to ticket a woman who had parked illegally in a handicapped spot. Acknowledging that Gold had been falsely arrested for disorderly conduct (App. 8), but without discussing his rights under the First, Fourth and Fourteenth Amendments of the U.S. Constitution, or any federal appellate decisions discussing them, the Court of Appeals held that the individual arresting officers were entitled to qualified immunity under the "clearly established" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1980), because, "[a]t the time [of the officers' conduct], no cases clearly established that [Gold's] actions did not constitute legally proscribed disorderly conduct" (App. 8). In support of that holding, the Court of Appeals examined only Florida state-court decisions defining disorderly conduct under Florida law (App. 6-7). The court did not acknowledge or discuss any decisions of this Court or of any other federal Court of Appeal. Having exonerated the individual arresting officers, the Court of Appeals likewise immunized the remaining individual defendant, Police Chief Calvin Ross, on the same basis (App. 10).

The full court subsequently denied rehearing en banc, over a lengthy dissent by Judge Barkett, a former Chief Justice of the Florida Supreme Court (App. 14-31). Judge Barkett argued that the First Amendment protection of Mr. Gold's remarks is unequivocally established in this Court's decisions, and those of every other federal appellate court to address the issue; that under those decisions, "no reasonable officer could possibly have believed that Gold's words were criminal" (App. 16); that

this Court has held expressly that the "clearly established" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), does not require a history of prior holdings on identical facts, but only "fair warning" by any measure, *see United States v. Lanier*, 520 U.S. ___, 117 S. Ct. ___, 137 L. Ed. 2d 432 (1997); and that the Florida state-court decisions on the subject, if relevant, also satisfy the "clearly established" standard (App. 21-29).[1]

2. The Facts.

The relevant facts are stated in the panel opinion, which we quote below (App. 2-3):

> The incident giving rise to Gold's action occurred on October 18, 1991. On that day, Gold pulled into a congested bank parking lot so that his passenger could use the bank's automated teller machine (ATM). While waiting for a parking space to open up, Gold noticed a uniformed police officer keeping watch over the area. He also noticed a woman who did not appear to be handicapped walk to her car parked in a handicapped space, get in, and start to drive away. Disturbed by this, Gold yelled to the officer, "aren't you supposed to give them a ticket for parking in a handicapped spot?" (R.2-91 at 28.) The officer did not respond. Gold then found a parking space, parked his car, walked toward the ATM, and loudly remarked to no one in particular, "Miami police don't do shit." (R.2-91 at 34.)

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[1] The case then proceeded to trial against the City of Miami, resulting in a verdict for Gold which is currently on appeal (*see* App. 8 n. 6).

Upon hearing Gold's remark, a plainclothes officer who had been standing in the ATM line stated to the uniformed officer, "I think this guys [sic] got a problem." (R.2-91 at 36.) To this, Gold replied, "I don't have a problem. I'm just saying that 'Miami police don't do shit.' " (R.2-91 at 36.) A different plainclothes officer then approached Gold and asked him for identification. After Gold produced his Florida driver's license and Florida Bar membership card, the officer headed toward the uniformed officer's patrol car to do a radio check on the identification. The officer soon was joined by the uniformed officer and the other plainclothes officer.

Upon observing all of this, a couple in the ATM line remarked, "I can't believe they're doing this." (R.2-91 at 40.) Gold talked to that couple for a few minutes then approached the three officers and asked them what was going on. At that point, the officers arrested him for "disorderly conduct" and asked him to put his hands behind his back. Although Gold did so without resistance, the officers later charged him, along with the disorderly conduct charge, with "resisting arrest without violence."

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision 1) violated the appropriate analytical framework by failing to address first the constitutional underpinnings of the plaintiff's claim; 2) applied the wrong definition of "clearly established" by insisting upon a controlling precedent on analogous facts – a standard which this Court three times has found to be

inappropriate; and 3) erroneously declined to hold, under the appropriate standard, thus creating conflict with five other Courts of Appeals, that the officers' arrest of Michael Gold violated "clearly established" law. For all three reasons, the conferral of immunity upon the individual arresting officers was erroneous, as was the conferral of immunity upon Defendant Police Chief Ross on the same basis (*see* App. 10). Given the clear conflict with the decisions of this Court and the other Courts of Appeal, review by certiorari is appropriate.

1. The Framework for Analysis.

In its recent decision in *County of Sacramento v. Lewis*, ___ U.S. ___ (1998) (1998 WL 259980, *4 n.5), this Court reiterated the two-step analysis appropriate "in any action under § 1983": "[T]he first step is to identify the exact contours of the underlying right said to have been violated" – that is, "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Accord, Graham v. Connor*, 490 U.S. 386, 394 (1989). That inquiry is "[a] necessary concomitant" to the second step – the "determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted. . . . " *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), *quoted in County of Sacramento v. Lewis*, 1998 WL 259980, *4 n.5. The preliminary inquiry is necessary because "even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted"; and if the court eschews that inquiry, "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *Id.* Therefore, "the better approach is to

determine the right before determining whether it was previously established with clarity," *id.* – that is, before deciding whether the defendant is entitled to qualified immunity because his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[2]

In the instant case, as we have noted, the Court of Appeals did not discuss the underlying constitutional question, but merely found it "clear from the facts viewed in the light most favorable to Gold that the officers did not have actual probable cause to arrest Gold for disorderly conduct" (App. 8). "That said" (*id.*), the Court of Appeals then held that the officers nevertheless were entitled to a qualified immunity. In its analytical framework, therefore, the Court of Appeals skipped a "necessary concomitant to the determination" of the immunity defense, *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) – an omission which alone should warrant reversal. In addition, as we note below, the Court of Appeals' failure to explore the underlying First Amendment doctrine was the starting point of its erroneous application of the "clearly established" standard for appraising the asserted privilege, which application created conflict with at least five other Courts of Appeal.

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[2] Both steps present questions of law for the court, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), viewing the evidence in the light most favorable to the plaintiff, *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

2. The Arrest of Michael Gold Violated His First and Fourteenth Amendment Rights.

As Judge Barkett remarked in dissenting from the Court of Appeals' denial of en banc review, "Gold's speech is precisely the kind that lies at the core of the First Amendment" (App. 16). As the panel opinion notes, in the light most favorable to Gold, the evidence is that he suggested to a police officer that a woman should be ticketed for illegally parking in a handicapped spot; the officer did not respond, and Mr. Gold said loudly that "Miami police don't do shit"; one officer remarked that Gold appeared to have a problem; Gold answered: "I don't have a problem. I'm just saying that Miami police don't do shit"; another officer secured Gold's driver's license and Florida Bar membership card, and conducted a radio check; Gold talked for a few minutes with a nearby couple, and then approached the officers and asked them what was happening; and the officers then arrested him. The relevant decisions of this Court (before the October, 1991 arrest in this case) leave no question that Gold's remarks were protected by the First and Fourteenth Amendments, and that the arrest was unlawful.

After *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572-74 (1941), allowing prohibition only of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace"; and *Terminello v. City of Chicago*, 331 U.S. 1, 4-5 (1948), striking down a statute which "permitted conviction" for speech which "invited public dispute, or brought about a condition of unrest," on the ground that speech is "protected against

censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest," four more recent decisions unequivocally establish the officers' unlawful conduct. In *Gooding v. Wilson*, 405 U.S. 518, 520, 522-23, 528 (1972), the Court struck down a Georgia statute defining breach of the peace to include "opprobrious words or abusive language," holding that mere "vulgar or offensive" language does not satisfy the *Chaplinsky* standard of fighting words, in the absence of any "likelihood that the person addressed would make an immediate violent response. . . . " In *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973), in which "the petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him," the judgment was reversed for punishing "constitutionally protected speech," because, in the absence of "abusive language or fighting words," "one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer."

In *Lewis v. City of New Orleans*, 415 U.S. 130, 132-34 (1974), the Court struck down a city ordinance making it unlawful to "curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police," as applied to the mother of an arrest suspect who assertedly shouted profanities at the officers, because "the proscription of the use of opprobrious language, embraces words that do not by their very utterance inflict injury or tend to incite an

immediate breach of the peace." *Id.* at 133, *quoting Gooding v. Wilson*, 405 U.S. 518, 522 (1972).[3] And in *City of Houston v. Hill*, 482 U.S. 451, 461-65 & n.11 (1987), the Court struck down as overbroad a municipal ordinance making it unlawful to "interrupt a police officer in the performance of his or her duties," as applied to a protester who assertedly shouted obscenities at police officers to distract them from arresting his friend:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.
>
> * * *
>
> The Houston ordinance . . . is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that "in any manner . . . interrupt[s]" an officer. The Constitution does not allow such speech to be made a crime.[11/] The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.
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> * * *

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[3] In an earlier decision, *Lewis v. City of New Orleans*, 408 U.S. 913 (1972), the Court had vacated Mrs. Lewis' original conviction and remanded for reconsideration in light of *Gooding*. Justice Powell's concurrence opined that Mrs. Lewis' language would have constituted fighting words if "addressed by one citizen to another, face to face and in a hostile manner," "[b]ut the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen."

11/ . . . [I]f some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment. . . .

. . . What a municipality may not do . . . and what Houston has done in this case, is to attempt to punish such conduct by broadly criminalizing speech directed to an officer – in this case, by authorizing the police to arrest a person who in *any* manner verbally interrupts an officer.

* * *

This Houston ordinance . . . is not narrowly tailored to prohibit only disorderly conduct or fighting words. . . . Although we appreciate the difficulty of drafting precise laws, we have repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.

These decisions, none of them acknowledged or discussed by the Court of Appeals, clearly, unambiguously and unequivocally declare the illegality of the defendant officers' arrest of Michael Gold, on the pretense that his criticism of the officers constituted disorderly conduct.

3. The Court of Appeals Applied the Wrong Legal Standard for Analyzing Qualified Immunity, by Requiring that the Very Action in Question Have Been Previously Held To Be Unlawful by a State Court; and Its Holding Conflicts With the Decisions of Several Other Circuit Courts of Appeal.

As we have noted, the Court of Appeals declared that the plaintiff could satisfy the "clearly established" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), only by demonstrating that "[a]t the time [of the arrest]," the extant cases "clearly established that [Gold's] actions did not constitute legally proscribed disorderly conduct" (App. 8). This insistence upon virtually identical facts in prior cases is found in earlier Eleventh Circuit decisions.[4] At least, however, those earlier decisions examined the prior holdings of this Court and other federal appellate courts. In the instant case, after insisting upon a factually-analogous precedent, the Court of Appeals then examined only state-court decisions, concluded that they were fact-specific and therefore equivocal, and held that the

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[4] *See, e.g., Jenkins v. Talladega City Board of Education*, 115 F. 3d 821, 826 (11th Cir. 1997) (en banc) ("In short, as conceded by the plaintiffs, neither the Supreme Court nor any court in this circuit nor the Alabama courts, on or before May 1, 1992, had ever actually applied the test established in [*New Jersey v. T.L.O.*, 469 U.S. 325 (1975)] to define a reasonable (or unreasonable) search in the context of facts materially similar to those of this school search"), *cert. denied*, ___ U.S. ___, 118 S. Ct. 412, 139 L. Ed. 2d 315 (1997); *Adams v. St. Lucie County Sheriff's Dept.*, 998 F. 2d 923 (11th Cir. 1993) (en banc), *adopting dissenting opinion of Edmondson, J., in* 962 F. 2d 1563, 1575 (11th Cir. 1992) ("The facts need not be the same as the facts of the immediate case. But they do need to be materially similar").

officers were entitled to a qualified immunity. As Judge Barkett, a former Chief Justice of the Florida Supreme Court, demonstrated in her dissent from the denial of en banc review, the Court of Appeals applied the wrong definition of "clearly established"; erred in failing to examine the decisions of this Court; and misconstrued the Florida state-court decisions in any event.

a. Defining "Clearly Established." First, this Court has held explicitly that the "clearly established" standard does not require a specific precedent based upon identical or analogous facts. To be sure, in refining previous incarnations of the qualified-immunity doctrine to eliminate subjective criteria in preference for the objective "clearly established" test in *Harlow v. Fitzgerald*, the Court declined to define that phrase, noting that "[a]s in Procunier v. Navarette, 434 US [555, 565 (1978)], we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.' " *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 n.32 (1982).

A few years later, however, in *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985), in the course of enforcing a qualified immunity from liability for an illegal wiretap – in light of the ambiguity of contemporaneous precedent on the point – the Court emphasized that "[w]e do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances." And two years later, in *Anderson v. Creighton*, 483 U.S.

635, 638, 640 (1987), after reiterating the rule that governmental officials are immune "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated," the Court added:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Mitchell and *Anderson* leave no question that the Court of Appeals erred in requiring an express precedent, on analogous facts, as a condition of the "clearly established" criterion. And if there were any doubt of that point, as Judge Barkett noted in dissenting from en banc denial (App. 16), it was resolved in *United States v. Lanier*, 520 U.S. ___, 117 S. Ct. ___, 137 L. Ed. 2d 432 (1997), by the Court's application of the criminal analog of § 1983, 18 U.S.C. § 242, which the Court held to embrace the identical standard of fair notice as § 1983. The Court of Appeals in *Lanier* had held "that criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of [the Supreme] Court (not any other federal, or state court), and only when the right has been held to apply in 'a factual situation fundamentally similar to the one at bar' " – a standard which "[t]he Court of Appeals regarded . . . 'as substantially higher than the "clearly established" standard used to judge qualified immunity' in civil cases under [§ 1983]." 137 L. Ed. 2d at 440. In

reversing, this Court held that the civil standard is identical to the criminal standard, and that neither requires a pre-existing precedent on analogous facts, *id.* at 443-46:

> [T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.
>
> We applied this standard in *Screws v. United States*, 325 US 91, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330 (1945), which recognized . . . that this constitutional difficulty [of fair warning] does not arise when the accused is charged with violating a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." . . .
>
> * * *
>
> Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. . . .
>
> * * *
>
> In the civil sphere . . . the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. The fact that one has a civil

> and the other a criminal law role is of no significance; both serve the same objective. . . . To require something clearer than "clearly established" would, then, call for something beyond "fair warning."
>
> . . . [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," *Anderson* [*v. Creighton*, 483 U.S. 635, 640 (1987)]. As Judge Daughtery noted in her dissenting opinion in this case, " '[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.' " . . . In sum, as with civil liability under § 1983 or *Bivens* [*v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)], all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in the light of pre-existing law the unlawfulness [under the Constitution is] apparent," *Anderson, supra*, at 640, 97 L Ed 2d 523, 107 S Ct 3034. Where it is, the constitutional requirement of fair warning is satisfied.

These decisions leave no question of the Court of Appeals' fundamental error – in this and its earlier decisions, *see supra* note 4 – in defining "clearly established" in terms which this Court three times has expressly

rejected. The impropriety of the test now employed in the Eleventh Circuit alone warrants this Court's review.

b. Michael Gold's Constitutional Right Was Clearly Established. Given that the Court of Appeals applied the wrong standard, failing to examine any of the extant decisions of this Court, it is not surprising that it erred in failing to recognize that Mr. Gold's First Amendment rights were clearly established at the time of his unlawful arrest. We refer the Court to the discussion of those decisions at pp. 8-11, *supra*. Nor is it surprising that the Court of Appeals' decision expressly and directly conflicts with the decision of every other Court of Appeals to apply the "clearly established" test to a police officer's arrest. *See, e.g., Spiller v. City of Texas City, Police Dept.*, 130 F. 3d 162 (5th Cir. 1997) (no qualified immunity for arresting a motorist who told an off-duty policeman at a gas station to "move his damn truck"); *Knox v. Southwest Airlines*, 124 F. 3d 1103 (9th Cir. 1997) (verbal exchange at airport; demand for officer's name and badge number; refusal to exit immediately after being ordered to do so); *MacKinney v. Nielsen*, 69 F. 3d 1002 (9th Cir. 1995) (writing with washable chalk on public sidewalk; failure to immediately stop); *Guffey v. Wyatt*, 18 F. 3d 869 (10th Cir. 1994) (arrest of referee at hotly-contested high school basketball game); *Gainor v. Rogers*, 973 F. 2d 1379 (8th Cir. 1992) (arrest of person walking through downtown carrying a large cross and distributing leaflets); *Enlow v. Tishomingo County*, 962 F. 2d 501, 509-10 (5th Cir. 1992) (on plaintiff's version, inquiry whether the sheriff had a search warrant or an arrest warrant; taking photographs of the officers); *Buffkins v. City of Omaha*, 922 F. 2d 465 (8th Cir. 1990)

(calling police officer an "asshole"); *Duran v. City of Douglas*, 904 F. 2d 1372 (9th Cir. 1990) (obscene gestures and yelling profanities); *Bailey v. Andrews*, 811 F. 2d 366 (7th Cir. 1987) (telling officer "I want my damn dog" and "did you shoot my dog?"); *Vela v. White*, 703 F. 2d 147 (5th Cir. 1983) (walking down the street; agitated questioning about arrest). Every one of these decisions, on analogous facts, conflicts with the Court of Appeals' holding in the instant case.

c. The Florida State-Law Decisions. This conclusion is not forestalled by the Court of Appeals' reference to the extant Florida state-law decisions defining the behavior which the Florida courts believe may permissibly be punished as disorderly conduct. At the outset, we are not certain that state-court decisions should play any role in advising police officers of the permissibility of their conduct under federal law. This Court has said only that "[s]tate law may bear upon a claim under the Due Process Clause when the property interests protected by the Fourteenth Amendment are created by state law." *Davis v. Scherer*, 468 U.S. 183, 193 n.12 (1984), *citing Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). On a federal question, "in the face of Supreme Court precedent articulating substantive constitutional rights, the defendant's claim that [state-court] cases somehow obscured otherwise clearly established law is simply not persuasive." *Guffey v. Wyatt*, 18 F. 3d 869, 872 (10th Cir. 1994). And even if Florida law could somehow obscure the unequivocal message of the federal decisions, as Judge Barkett pointed out (App. 21-24), all of the Florida Supreme Court decisions unambiguously parallel the First

Amendment protections accorded under federal law;[5] any intermediate Florida appellate decisions are unavailable to disturb a state of the law otherwise "clearly established";[6] in any event, all but one of the intermediate appellate decisions in Florida unequivocally endorse the federal and Florida Supreme Court rulings;[7] and the single intermediate decision cited by the Court of Appeals was based on the finding that the defendant had deliberately attempted "to incite the police officer and perhaps others to violence."[8] No such finding is available on the record in this case. Therefore, to the extent that Florida state-court decisions are relevant, no less than the federal decisions, they "clearly establish" the officers' constitutional violation.

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[5] *See Morris v. State*, 335 So. 2d 1 (Fla. 1976); *State v. Saunders*, 339 So. 2d 641 (Fla. 1976); *Gonzales v. City of Belle Glade*, 287 So. 2d 669 (Fla. 1973). *See also White v. State*, 330 So. 2d 3, 5-7 (Fla. 1976).

[6] *See Jenkins v. Talladega City Board of Education*, 115 F. 3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 118 S. Ct. 412, 139 L. Ed. 2d 315 (1997); *Hamilton v. Cannon*, 80 F. 3d 1525, 1532 n.7 (11th Cir. 1996).

[7] *See K.Y.E. v. State*, 557 So. 2d 956 (Fla. 1st DCA 1990); *D.C.E. v. State*, 381 So. 2d 1097 (Fla. 1st DCA 1979); *Harbin v. State*, 358 So. 2d 856 (Fla. 1st DCA 1978); *Clanton v. State*, 357 So. 2d 455 (Fla. 2d DCA 1978); *Phillips v. State*, 314 So. 2d 619 (Fla. 4th DCA 1975). These decisions all were on the books at the time of the October, 1991 arrest in this case. As Judge Barkett pointed out in dissent (App. 27 n.2), at least four subsequent intermediate appellate decisions are consistent. *See K.S. v. State*, 697 So. 2d 1275 (Fla. 3d DCA 1997); *Miller v. State*, 667 So. 2d 325 (Fla. 1st DCA 1995); *B.R. v. State*, 657 So. 2d 1184 (Fla. 1st DCA 1995); *L.A.T. v. State*, 650 So. 2d 214 (Fla. 3d DCA 1995).

[8] *L.J.M. v. State*, 541 So. 2d 1321, 1323 (Fla. 1st DCA 1989).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Michael C. GOLD, Plaintiff-Appellee,

v.

CITY OF MIAMI, a Florida Municipal Corporation, Defendant,

Calvin Ross, individually, Rafael Suarez, individually, Jorge Perez, individually, William Campbell, Individually, Defendants-Appellants.

No. 95-4996.

United States Court of Appeals,
Eleventh Circuit.

Sept. 17, 1997.

Kathryn C. Pecko, Asst. City Attorney, A. Quinn Jones, III, Leon M. Firtel, Theresa L. Girten, Miami, FL, for Defendants-Appellants.

Charles M. Baron, North Miami Beach, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT, Chief Judge, COX, Circuit Judge, and MESKILL*, Senior Circuit Judge.

PER CURIAM:

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* Honorable Thomas J. Meskill, Senior U.S. Circuit Judge of the Second Circuit, sitting by designation.

Rafael Suarez, Jorge Perez, William Campbell, and Calvin Ross appeal the district court's denial of their motion for summary judgment predicated on qualified immunity in this civil rights action filed by Michael Gold. For the reasons that follow, we reverse.

I. *Facts*[1]

The incident giving rise to Gold's action occurred on October 18, 1991. On that day, Gold pulled into a congested bank parking lot so that his passenger could use the bank's automated teller machine (ATM). While waiting for a parking space to open up, Gold noticed a uniformed police officer keeping watch over the area. He also noticed a woman who did not appear to be handicapped walk to her car parked in a handicapped space, get in, and start to drive away. Disturbed by this, Gold yelled to the officer, "[a]ren't you supposed to give them a ticket for parking in a handicapped spot?" (R.2-91 at 28.) The officer did not respond. Gold then found a parking space, parked his car, walked toward the ATM, and loudly remarked to no one in particular, "Miami police don't do shit." (R.2-91 at 34.)

Upon hearing Gold's remark, a plainclothes officer who had been standing in the ATM line stated to the

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[1] The district court's order denying summary judgment did not contain findings of fact. We therefore have no choice but to glean the facts from the record.

The facts we state for the present purposes are construed in the light most favorable to Gold. *See Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1420 n. 1 (11th Cir. 1997); *McKinney v. DeKalb County, Ga.*, 997 F.2d 1440, 1442 (11th Cir. 1993).

uniformed officer, "I think this guys [sic] got a problem." (R.2-91 at 36.) To this, Gold replied, "I don't have a problem. I'm just saying that 'Miami [p]olice don't do shit.' " (R.2-91 at 36.) A different plainclothes officer who had been standing next to the uniformed officer then approached Gold and asked him for identification. After Gold produced his Florida driver's license and Florida Bar membership card, the officer headed toward the uniformed officer's patrol car to do a radio-check on the identification. The officer soon was joined by the uniformed officer and the other plainclothes officer.

Upon observing all of this, a couple in the ATM line remarked, "I can't believe they're doing this." (R.2-91 at 40.) Gold talked to the couple for a few minutes then approached the three officers and asked them what was going on. At that point, the officers arrested him for "disorderly conduct" and asked him to put his hands behind his back. Although Gold did so without resistance, the officers later charged him, along with the disorderly conduct charge, with "resisting arrest without violence."

After handcuffing Gold, the uniformed officer assisted Gold into the back of his patrol car. Some moments later, Gold complained to him that the handcuffs were applied so tightly that he was in pain. However, the uniformed officer did not loosen the handcuffs until roughly twenty minutes after Gold complained.

II. *Procedural History*

Gold sued the three officers, Campbell, Perez, and Suarez, under 42 U.S.C. § 1983, alleging that they (1)

violated his First, Fourth, and Fourteenth Amendment rights by falsely arresting him for disorderly conduct; and (2) violated his Fourth Amendment rights by applying the handcuffs too tightly and leaving them that way for an unreasonable amount of time. He also sued the now-former Miami Police Chief, Calvin Ross, under § 1983, alleging that Ross violated his First, Fourth, and Fourteenth Amendment rights by failing to train and supervise subordinate officers regarding the constitutional limitations of Florida's disorderly conduct statute and regarding the proper response to an arrestee's handcuff complaints.[2]

The officers eventually moved for summary judgment on the basis of qualified immunity, and Gold moved for partial summary judgment on the basis of liability. The district court concluded that factual issues remained, and, without explicitly conducting a qualified immunity analysis, denied both motions. The officers appeal that denial, raising one issue: whether the district court erred in implicitly concluding that they violated clearly established law.[3]

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[2] Gold also asserted various state law claims against the officers and against the City of Miami. Those claims are not involved in this appeal.

[3] We review this legal issue de novo. *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1556 (11th Cir. 1993).

We reject Gold's argument that we do not have jurisdiction to decide this issue since the district court did not explicitly conduct a qualified immunity analysis. Implicit in the district court's denial of summary judgment was a conclusion that the defendants violated clearly established law. *See Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996); *Foy v. Holston*, 94 F.3d 1528, 1531 n. 3 (11th Cir. 1996).

III. *Discussion*

Qualified immunity shields government officials performing discretionary functions from civil litigation and damage liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).[4] Under this standard, a plaintiff must show that "when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *See Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

A. False Arrest

We first determine whether the officers are entitled to qualified immunity on Gold's claim that the officers violated his First, Fourth, and Fourteenth Amendment rights by falsely arresting him for disorderly conduct. In making this determination, the central issue is whether, on the date of Gold's arrest, the officers had arguable probable cause to believe that Gold had committed the offense of disorderly conduct. *See Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990). The standard for arguable probable cause is "whether a reasonable officer in the same circumstances and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in the light of well-established law." *See Eubanks v. Gerwen*, 40 F.3d 1157, 1160 (11th Cir.

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[4] The parties do not dispute that the officers were acting within their discretionary authority at all relevant times.

1994). As we have emphasized before, arguable probable cause is distinct from actual probable cause. *See Post*, 7 F.3d at 1559.

Florida statutory law defines disorderly conduct as "acts [that] . . . are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or . . . brawling or fighting, or . . . conduct [that] constitute[s] a breach of the peace or disorderly conduct. . . . " *See* FLA. STAT. § 877.03 (1994). To avoid First Amendment concerns in cases involving speech, the Florida Supreme Court strictly limited the law to apply in such cases only where the speech, by its very utterance, " 'inflict[s] injury or tend[s] to incite an immediate breach of the peace . . . ' " *See State v. Saunders*, 339 So.2d 641, 644 (Fla.1976) (quoting *White v. State*, 330 So.2d 3, 7 (Fla.1976)).[5]

Based on this limitation, the Florida Supreme Court has reversed convictions for disorderly conduct where a defendant merely directed profane language at police officers in the presence of others, *see Morris v. State*, 335 So.2d 1, 2 (Fla.1976), and where defendants made threatening comments to and voiced "intemperate expletives" near police officers, *see Gonzales v. City of Belle Glade*, 287 So.2d 669, 670-71 (Fla.1973). In both cases, the court made it clear that a person does not violate the disorderly

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[5] The Florida Supreme Court held that the disorderly conduct statute also could apply, without violating the First Amendment, in speech cases where the speech is known to be false and "creates a clear and present danger of bodily harm to others," such as shouts of fire in a crowded theater. *See State v. Saunders*, 339 So.2d 641, 644 (Fla.1976).

conduct law merely by annoying those around them or by employing profane language to express outrage. However, the court also made it clear that violation of the disorderly conduct law largely depends on the facts and circumstances of each case, noting that " '[i]t is the degree of loudness, and the circumstances [under] which [the speech is] uttered, [that] takes [it] out of the constitutionally protected area.' " *See Morris*, 335 So.2d at 2 (quoting *White*, 330 So.2d at 6).

The fact-intensive nature of the constitutional inquiry accounts for the varying views in the Florida appellate courts of what constitutes legally proscribed disorderly conduct. In one case, a Florida appellate court affirmed the disorderly conduct conviction of a juvenile who directed profanities at a police officer in a loud voice and in the presence of others. *See L.J.M. v. State*, 541 So.2d 1321, 1322-23 (Fla. 1st DCA 1989). According to the court, "[i]f this country is to preserve in its citizens any sense of discipline and respect for others in our society, the [F]irst [A]mendment simply cannot be construed to condone this type of conduct." *See id.* at 1323. In another case, the same appellate court reversed a delinquency adjudication based on disorderly conduct of a juvenile who leaned from a car window and yelled unprovoked profanities at nearby police officers. *See D.C.E. v. State*, 381 So.2d 1097, 1098-99 (Fla. 1st DCA 1979).

Given that what constitutes legally proscribed disorderly conduct is subject to great subjective interpretation of specific facts – for example, the words used, the tone used, the decibels used, and the reaction of onlookers – we are constrained to conclude that a reasonable officer in the same circumstances and possessing the same

knowledge as the officers in this case could have reasonably believed that probable cause existed to arrest Gold for disorderly conduct. The evidence, viewed in the light most favorable to Gold, reflects that Gold twice used profanities in a loud voice, in a public place, and in the presence of others. At the time, no cases clearly established that those actions did not constitute legally proscribed disorderly conduct.

We pause at this point to reemphasize that the arguable probable cause inquiry is distinct from the actual probable cause inquiry. It is clear from the facts viewed in the light most favorable to Gold that the officers did not have actual probable cause to arrest Gold for disorderly conduct.[6] That said, the officers nonetheless are entitled to qualified immunity.[7] As the Supreme Court has stated, "[t]he qualified immunity standard 'gives ample room for mistaken judgments'. . . . " *See Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986)). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.*; 502 U.S. at 229, 112 S.Ct. at 537 (quoting *Davis v. Scherer*,

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[6] In Gold's case against the City of Miami, a jury in fact found that the officers did not have probable cause to arrest Gold for disorderly conduct. It rendered a verdict of $26,500.00 in favor of Gold.

[7] Gold did not argue to the district court, and does not argue on appeal, that the officers violated clearly established law by falsely arresting him for resisting arrest without violence. We therefore do not address that issue here.

468 U.S. 183, 196, 104 S.Ct. 3012, 3020, 82 L.Ed.2d 139 (1984)).

B. Excessive Force

We next determine whether the officers are entitled to qualified immunity on Gold's claim that the officers violated his Fourth Amendment right to be free from excessive force by applying the handcuffs too tightly and by leaving them that way for an unreasonable amount of time. Whether an officer used excessive force turns on a number of factors, such as "the severity of the crime, whether the suspect pose[d] an immediate threat, and whether the suspect [was] resisting or fleeing. Use of force must be judged on a case-by-case basis. . . . " *Post*, 7 F.3d at 1559 (citation omitted). Because of this lack of a bright-line standard, "qualified immunity applies unless application of the standard would inevitably lead" a reasonable officer in the defendant's position to conclude that the force was unlawful. *See id.*

Here, the facts viewed in the light most favorable to Gold show that Gold experienced pain from the handcuffs for roughly twenty minutes and that Gold suffered only skin abrasions for which he did not seek medical treatment. The minor nature of this injury reflects that minimal force was used to apply the handcuffs. Certainly, these circumstances would not "inevitably lead" a reasonable officer in the officers' positions to conclude that the force used to apply the handcuffs was unlawful. Accordingly, the officers are entitled to qualified immunity on Gold's excessive force claim.

C. Deliberate Indifference

Last, we determine whether now-former Police Chief Ross is entitled to qualified immunity on Gold's § 1983 claim that Ross violated his First, Fourth, and Fourteenth Amendment rights by failing to train subordinate officers regarding the constitutional limitations of Florida's disorderly conduct statute and regarding the proper response to an arrestee's handcuff complaints.

A supervisor will be denied qualified immunity from a § 1983 claim where "a reasonable person in the supervisor's position would have known that his conduct infringed the constitutional rights of the plaintiff and his conduct was causally related to the constitutional violation committed by his subordinate." *McKinney*, 997 F.2d at 1443. Here, the facts viewed in the light most favorable to Gold reflect that Ross gave no training to the officers on the constitutional limitations of the disorderly conduct statute or on the proper response to an arrestee's handcuff complaints. We are not convinced that a reasonable person in Ross's position would have known that such a failure infringed on constitutional rights. Therefore, Ross is entitled to qualified immunity on this claim.

IV. *Conclusion*

For the reasons stated above, we conclude that Suarez, Perez, Campbell, and Ross are entitled to qualified immunity on each of Gold's federal claims. Accordingly, we reverse the district court's denial of their motion for summary judgment on those claims and remand to the district court for further proceedings.

REVERSED and REMANDED.

United States District Court
Southern District of Florida

MICHAEL C. GOLD,
Plaintiff,

vs.

CITY OF MIAMI, a Florida Municipal corporation; CALVIN ROSS, individually; RAFAEL SUAREZ, individually; JORGE PEREZ, individually; and WILLIAM CAMBELL, individually,

Defendants.

Case No. 92-1673-CIV-KEHOE

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(Filed Jul. 17, 1995)

THIS CAUSE came before the Court upon the Defendants' motion [Docket No. 77] for a summary judgment and upon the Plaintiffs' motion [Docket No. 87] and amended motion [Docket No. 96] for a partial summary judgment on the issue of the liability of each Defendant.

After a review of the motions, responses replies and the supplemental filings, it is

ORDERED AND ADJUGED that (1) the Defendants' motion [Docket No. 77] for a summary judgment is *DENIED*[1] and (2) the Plaintiff's motion [Docket No. 87] and amended motion [Docket No. 96] for a partial summary judgment on the issue of the liability of each Defendant are *DENIED*.[2]

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[1] The Defendants' motion [Docket No. 89] for oral argument on their motion for summary judgment is *DENIED*.

[2] Except for a corrected minor typographical error and the numbering of paragraphs, the plaintiffs' motion [Docket No. 87]

As the United States Supreme Court has established in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the initial burden in a motion for summary judgment falls on the moving party to establish " . . . the basis for [the] motion, . . . identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991), quoting from *Celotex, supra.* In determining whether the movant has satisfied this burden, the Court is also required to view the evidence and *all factual inferences* arising therefrom in the light most favorable to the non-moving party, and "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Augusta Iron and Steel Work, Inc. v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1982).

The Court acknowledges that in the present motions for summary judgment, each side has presented arguments on various aspects of the case, in which they apply sound legal reasoning to essentially undisputed facts and display a high level of pretrial advocacy. But, it is also apparent to the Court that even where the facts are not in dispute, there still remains a lingering array of *disputed* "factual inferences arising therefrom" that cannot be resolved by motions of summary judgment.[3]

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and amended motion [Docket No. 96] for a partial summary judgment are identical.

[3] Disputed "factual inferences" arise, *inter alia*, in connection with the facts surrounding the detention of the

Consequently, the Court ***FINDS***, and so ***CONCLUDES***, that the present motions are deficient in this respect and, accordingly, the motion of the Defendants for a summary judgment and the motion and amended motion of the Plaintiff for a partial summary judgment on the issue of the liability of the Defendants cannot be sustained.

DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of July, 1995.

/s/ James W. Kehoe
JAMES W. KEHOE
SENIOR UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Charles M. Baron, Esq.
Leon M. Firtel, Esq.

Plaintiff by Defendants Suarez and Perez, the transfer of the Plaintiff to Defendant Campbell, the arrest and handcuffing of the Plaintiff, the delay by Defendant Campbell in loosening the Plaintiff's handcuffs after being informed that they were too tight. Disputed "factual inferences" also arise, *inter alia*, in connection with the facts surrounding the question of the individual Defendants' qualified immunity, the Defendant City's departmental policy concerning "disturbing the peace" and "fighting words" as reflected in the Department's officer training and post-training programs, etc.

Michael C. GOLD, Plaintiff-Appellee,

v.

CITY OF MIAMI, a Florida Municipal Corporation, Defendant,

Calvin Ross, individually, Rafael Suarez, individually, Jorge Perez, individually, William Campbell, individually, Defendants-Appellants.

No. 95-4996.

United States Court of Appeals,
Eleventh Circuit.

April 7, 1998.

Kathryn C. Pecko, Leon M. Firtel, Assts. City Attys., Miami, FL, for Defendants-Appellants.

Charles M. Baron, North Miami Beach, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida (No. 92-1673-CIV-JWK), James W. Kehoe, Judge.

ON PETITION FOR REHEARING

(Opinion Sept. 17, 1997, 11th Cir., 121 F.3d 1442).

Before HATCHETT, Chief Judge, and TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL and MARCUS, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), rehearing en banc is DENIED.

BARKETT, Circuit Judge, dissenting:

I respectfully dissent from the court's denial of rehearing *en banc*. In this case, the panel held that the police officers who arrested Gold for disorderly conduct based solely on his comments to them were entitled to qualified immunity on Gold's false arrest claim. Despite the Supreme Court's holding in *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), that the First Amendment fully protects speech critical of police officers and a wealth of Florida Supreme Court precedent declining to apply the Florida disorderly conduct statute in factually similar circumstances to avoid conflict with the First Amendment, the panel held that Gold's First Amendment rights were not clearly established, and that the officers had arguable probable cause to believe that Gold's speech, standing alone, violated Florida's disorderly conduct statute. The panel's conclusion that the officers had arguable probable cause to make an arrest in this case contravenes this overwhelming body of caselaw. Accordingly, we should rehear this case *en banc*.

The disorderly conduct for which Gold was arrested consisted of Gold yelling from his car to a police officer, "aren't you supposed to give them a ticket for parking in a handicapped spot," upon seeing a woman who did not appear to be disabled walk to her car in a handicapped space and drive away. When the police did nothing, Gold

> loudly remarked to no one in particular, "Miami police don't do shit."
>
> . . . .
>
> Upon hearing Gold's remarks, a plainclothes officer who had been standing in the ATM line stated to the uniformed officer, "I think this guys [sic] got a problem." To this Gold replied, "I don't have a problem. I'm just saying that Miami police don't do shit."

Gold v. City of Miami, 121 F.3d 1442, 1444 (11th Cir.1997). Under binding United States Supreme Court and Florida Supreme Court precedent existing at the time of Gold's arrest, no reasonable officer could possibly have believed that Gold's words were criminal. Gold's speech is precisely the kind that lies at the core of the First Amendment. There is nothing in the facts of this case even remotely to suggest that Gold's speech could be construed as falling within the very narrow category of fighting words or any other category of constitutionally proscribable speech. Accordingly, the officers in this case were not entitled to qualified immunity.

Disregarding these applicable precedents, the court's opinion found that Gold had not shown a violation of clearly established law, effectively holding that the law in a particular area is not clearly established for qualified immunity purposes, unless the plaintiff can point to a prior case involving identical facts. The panel's opinion emphasizes that, at the time of Gold's arrest, "no cases clearly established that [Gold's] actions did not constitute legally proscribed disorderly conduct." *Gold*, 121 F.3d at 1446. As the Supreme Court made explicitly clear in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219, 137

L.Ed.2d 432 (1997), such "fundamental similar[ity]" of underlying facts is not required to establish a violation of clearly established law. The purpose of qualified immunity, the *Lanier* Court explained, is simply to give government officials "fair warning" that their conduct violates federal constitutional or statutory rights. Comparing the "clearly established" concept in qualified immunity to the "fair warning" standard for a conviction under 18 U.S.C. §§ 241 and 242, the Court observed:

> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right". . . . [B]oth [the "clearly established" test and the "fair warning" standard] serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

Id. at ___, 117 S.Ct. at 1227 (citations omitted).

The Court held that even under the standards necessary to support a criminal conviction, precedents involving "fundamentally similar" facts are not necessary to give state officials fair warning that their conduct contravenes constitutional rights:

> Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar". . . . To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.

Id. Moreover, the Court recognized that some legal concepts are sufficiently clear that any reasonable person would know when his or her actions would violate those concepts:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." As Judge Daughtrey noted in her dissenting opinion in this case, " '[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.' "

Id. at ___ - ___, 117 S.Ct. at 1227-28 (citations omitted).

Under *Lanier*'s fair warning standard, the police officers are not entitled to qualified immunity in this case. First, at the time of Gold's arrest, the Supreme Court had specifically held that speech critical of police officers is constitutionally protected. Second, as the panel opinion recognizes, the Florida Supreme Court had specifically

reversed, as violative of the First Amendment, disorderly conduct convictions of defendants who had not only used expletives, but also made threatening comments to police officers – conduct far more egregious than Gold's. Finally, every other circuit that has addressed the issue of qualified immunity in a situation similar to that present here has had no trouble concluding that a police officer is not entitled to qualified immunity in these circumstances.

Supreme Court Precedent

The court's opinion in this case wholly ignores the First Amendment's protection of speech critical of the police, failing even to mention the United States Supreme Court's governing precedent in this area. In *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), the Supreme Court held that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id.* at 461, 107 S.Ct. at 2509. Applying this principle, the Court invalidated a Houston ordinance making it illegal to interrupt an officer in any manner, reasoning that "[t]he Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63, 107 S.Ct. at 2510 (footnote omitted). The Court made clear that the First Amendment does not permit states to "provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Id.* at 465, 107 S.Ct. at 2511-12; *see also Norwell v. City of Cincinnati*, 414 U.S. 14, 16, 94 S.Ct. 187, 188, 38 L.Ed.2d

170 (1973) (overturning conviction under disorderly conduct statute where "petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him").

To be sure, the Court in *Hill* noted that "the freedom verbally to challenge police action is not without limits," *Hill*, 482 U.S. at 463 n. 12, 107 S.Ct. at 2510 n. 12, recognizing that " 'fighting words' which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' are not constitutionally protected." *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942)). However, the fighting words doctrine has a narrower application where, as here, an individual's speech offends a police officer. *See Hill*, 482 U.S. at 462, 107 S.Ct. at 2510. As we have previously recognized, a police officer, "by virtue of his profession or training[, is] expected to absorb a certain amount of abuse without retaliating. . . . " *Lamar v. Banks*, 684 F.2d 714, 718 n. 13 (11th Cir.1982); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974) (Powell, J., concurring) ("[A] properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' ") (quoting *Lewis v. City of New Orleans*, 408 U.S. 913, 913, 92 S.Ct. 2499, 2499, 33 L.Ed.2d 321 (1972) (Powell, J., concurring)). As the Supreme Court observed in *Hill*, " '[s]peech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a *clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or*

unrest.' " *Hill,* 482 U.S. at 461, 107 S.Ct. at 2509 (quoting *Terminiello v. City of Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 895-96, 93 L.Ed. 1131 (1949) (emphasis added)); *accord Monroe v. State Court of Fulton County,* 739 F.2d 568, 575 (11th Cir.1984) ("A function of free speech is to invite dispute."); *Sweatt v. Bailey,* 876 F.Supp. 1571, 1580 (M.D.Ala.1995) ("[C]alling a law enforcement officer 'an ass' within his earshot in the 1990's should not provoke a violent reaction and therefore does not fall within the 'fighting words' doctrine.").

Florida Law

Consistent with these established First Amendment principles, Florida law protects the right of individuals to criticize the conduct of police officers, even using unpleasant and offensive words. Indeed, as the panel explicitly recognized, the Florida Supreme Court, in a series of cases involving speech critical of the police, has "made it clear that a person does not violate the disorderly conduct law merely by annoying those around [him] or by employing profane language to express outrage." *Gold,* 121 F.3d at 1445. Gold's actions fit squarely within this principle.

In *State v. Saunders,* 339 So.2d 641 (Fla.1976), the Florida Supreme Court held that Florida's disorderly conduct statute must be construed in light of the First Amendment and narrowed the reach of the statute to render it constitutional. The *Saunders* court construed the disorderly conduct statute

> so that it shall hereafter only apply either to words which "by their very utterance . . . inflict

> injury or tend to incite an immediate breach of the peace," or to words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others. We construe the statute so that no words except "fighting words" or words like shouts of "fire" in a crowded theatre fall within its proscription, in order to avoid the constitutional problem of overbreadth, and "the danger that a citizen will be punished as a criminal for exercising his right of free speech." With these two exceptions, Section 877.03 should not be read to proscribe the use of language in any fashion whatsoever.

Id. at 644 (citations omitted).

The Florida Supreme Court's cases construing the disorderly conduct statute in circumstances similar to those presented in this case, decided both before and after *Saunders*, clearly establish that the officers in this case could not have reasonably believed that they had probable cause to arrest Gold for criticizing the police. As the panel's opinion again recognizes, in *Morris v. State*, 335 So.2d 1 (Fla.1976), the Florida Supreme Court reversed a conviction for "disorderly conduct where a defendant merely directed profane language at police officers in the presence of others," *Gold*, 121 F.3d at 1445 – precisely what Gold did here. Likewise, in *Gonzales v. City of Belle Glade*, 287 So.2d 669 (Fla.1973), the Florida Supreme Court overturned two disorderly conduct convictions, finding that the defendants' threatening comments to police officers and use of an "intemperate expletive or two" were insufficient to sustain the convictions. "In neither case was there any evidence that the

actions of any of the appellants were more than annoying to those around them, and a violation . . . requires more than the creation of a mere annoyance." *Id.* at 670; *see also White v. State*, 330 So.2d 3, 5 (Fla.1976) ("The statute must not be construed to limit the use of a socially impermissible word merely as a tool of communication.").

Indeed, in *White*, the Florida Supreme Court expressly recognized that "protected speech may provoke violent dissent," but found that such disagreement was not a basis for criminally punishing speech. *Id.* at 6. To permit the imposition of criminal sanctions merely because an individual's words "may have offended the sensibilities of [a police officer] and others who heard them" would be inconsistent with the core principle of the First Amendment: "the right vigorously to advance a minority opinion even though that opinion may anger others and arouse forceful disagreement." *Id.* (discussing *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)). The *White* court drew a distinction between "mere words, used as a tool of communication," which are protected "even though they may not be acceptable in certain strata of society," and the use of words to "invade the rights of others to pursue their lawful activities." *Id.* at 7. Finding the latter to be unprotected, the court found that the defendant could be convicted for screaming at the top of his lungs for several minutes at a police station, disturbing the other people at the station and impeding their work. Thus, White's words were not punished because they were offensive, but because "by their very decibel count, [those words] did invade the right of others to pursue their lawful activities." *Id.* at 6. Indeed, White's "conduct would have been equally disorderly

had he merely recited 'Mary Had a Little Lamb' in the same tone and under similar circumstances." *Id.* at 7.

Ignoring its context in *White*, the panel pointed to the language in *White* that " '[i]t is the degree of loudness, and the circumstances [under] which [the speech is] uttered, [that] takes [it] out of the constitutionally protected area,' " *Gold*, 121 F.3d at 1445 (citations omitted), to suggest that because of the "fact-intensive nature of the [First Amendment] inquiry," *id.* at 1446, the officers did not have fair warning that their arrest of Gold was unconstitutional. This completely misses the mark. It is true that the First Amendment inquiry in this case is a fact-specific one, requiring us to determine whether the police officers could reasonably have believed that Gold's words " 'inflict[ed] injury or tend[ed] to incite an immediate breach of the peace'. . . . " *Saunders*, 339 So.2d at 644 (quoting *White*, 330 So.2d at 7). While there will undoubtedly be some situations in which the facts will legitimately give the police arguable probable cause to believe that an individual's speech meets this standard, we are not faced with such a situation here. The panel does not even attempt to demonstrate that a police officer could reasonably have believed that Gold's speech constituted fighting words or any other category of proscribable speech. Nor could it. Here there was no crowd to incite; there were no persons disturbed by Gold's speech. There were only police officers who heard unpleasant criticism and two bystanders concerned about the police's treatment of Gold.[1] At best, the evidence showed that Gold's

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[1] As described in the panel opinion, the only evidence that Gold's comment had any effect whatsoever on anyone other

statements attracted the attention of the two bystanders, but this does not suffice to give the officers arguable probable cause. At worst, and clearly the most likely scenario, the evidence suggests that the officers arrested Gold to retaliate against him for his criticism of their performance – a blatant violation of the First Amendment principles set forth in *Hill*. We may not shirk our obligation to consider whether *any* facts exist to support arguable probable cause simply because the governing standard is a fact-specific one. *Cf. Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir.1997) (analyzing "multifactored case-by-case balancing test" in concluding that officer's use of force "was so far beyond the hazy border between excessive and acceptable force that Mattox had to know that he was violating the Constitution").

The court also claims that there are "varying views in the Florida appellate courts of what constitutes legally proscribed disorderly conduct." *Gold*, 121 F.3d at 1446. But there are no "varying views" in the Florida Supreme Court – the only state court relevant for qualified immunity purposes. *See Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir.) (en banc) (qualified immunity analysis looks to "decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, [and] the highest court of the state where the case arose"), *cert. denied*, ___ U.S. ___, 118 S.Ct. 412, 139 L.Ed.2d 315 (1997); *Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir.1996)

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than the arresting officers was that a couple waiting in line, observing the police's treatment of Gold, stated, "I can't believe they're doing this." There was also evidence that the couple spoke with Gold for several minutes.

(same). Assuming, arguendo, that the opinions of the intermediate state appellate courts are relevant here, they, likewise, cannot fairly be characterized as expressing "varying views." The principles set forth by the Florida Supreme Court in *Saunders, Gonzales, White,* and *Morris* have regularly been applied by Florida appellate courts to overturn convictions based on facts similar to those here. The panel ignores this long line of cases in which the courts have refused to apply the Florida disorderly conduct statute to speech critical of the police, citing instead only a single case to support its position, the decision in *L.J.M. v. State,* 541 So.2d 1321 (Fla. 1st DCA 1989). As explained below, however, *L.J.M.* is wholly inapposite here.

At the time of Gold's arrest, there were no fewer than five precedents from the state district appellate courts that made clear that Gold's arrest violated clearly established law. For example, in *Harbin v. State,* 358 So.2d 856 (Fla. 1st DCA 1978), a woman was arrested for directly cursing a Deputy Sheriff who had been sent to accompany her husband to the couple's trailer while he picked up his clothes after a domestic dispute. She contended that her "mere words" were not sufficient to justify a disorderly conduct arrest under the latest Florida Supreme Court decisions. Quoting from *Saunders, White* and *Morris,* the district court of appeals agreed, finding that Harbin's speech did not constitute fighting words under the Florida precedents:

> The focus of our inquiry here, then, must revolve around whether appellant's admittedly profane words tended to "incite an immediate breach of the peace." . . . [T]he most that can be

> said about appellant's epithets is that they were offensive to the deputy who made the arrest and perhaps an object of curiosity to the neighbor who opened her window.

Id. at 857. Likewise, in *K.Y.E. v. State*, 557 So.2d 956 (Fla. 1st DCA 1990), a Florida appellate court overturned defendant's disorderly conduct conviction for continually singing "fuck the police" in public. The court found "no evidence" that the singing "evoked a response tending to inflict injury or incite an immediate breach of the peace." *Id.* at 957. Defendant's singing, "while annoying and offensive to the arresting officer, at best contributed to attracting a group of curious onlookers, but . . . did not breach the peace." *Id. See also D.C.E. v. State*, 381 So.2d 1097, 1099 (Fla. 1st DCA 1979) (holding a minor who shouted "f ___ pigs" three times at police officers from the window of his car at a busy intersection did not violate disorderly conduct ordinance); *Clanton v. State*, 357 So.2d 455, 456-57 (Fla. 2d DCA 1978) (holding that man who loudly yelled at a police officer who opened his passenger door that he "had no damn right to open the door" did not violate disorderly conduct statute); *Phillips v. State*, 314 So.2d 619, 621-22 (Fla. 4th DCA 1975) (holding that an officer lacked probable cause to arrest a man who said "F___ you" to a police officer).[2] These cases

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[2] Florida cases decided after the date of Gold's arrest confirm that Gold's arrest was contrary to clearly established Florida law. *See K.S. v. State*, 697 So.2d 1275, 1276 (Fla. 3d DCA 1997) (reversing disorderly conduct conviction where defendant's loud protests of police conduct "were not directed at the crowd but were instead a coarse expression of frustration at what K.S. perceived was an unjust accusation"); *Miller v.*

make clear that the officers could not have reasonably believed that they had probable cause to arrest Gold since, as discussed above, his words, though offensive to the police, did not incite an immediate breach of the peace, but simply attracted the attention of two curious bystanders.

L.J.M. does not counsel a different conclusion. In *L.J.M.*, two officers were standing at the side of the street talking to a group of people when the defendant directly approached them and addressed certain remarks to them concerning his arrest the night before on theft charges. Defendant's statements were loud and rude, and "everybody was watching him as he yelled at [one of the police officers]." The officer tried to ignore the remarks, saying "[w]e'll see you in court." Instead of desisting in front of the crowd, defendant shouted to the officer, "Man, you pussy-assed mother fucker." At that point, he was arrested by the officer, who characterized his words as "disruptive." In affirming the conviction, the court found that, in the totality of these circumstances, "it was well within the discretion of the judge below, sitting as the trier of fact, to find that appellant uttered the above-

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State, 667 So.2d 325, 328 (Fla. 1st DCA 1995) ("Pursuant to *Saunders* and its progeny, . . . there must be evidence of something more than loud or profane language or a belligerent attitude."); *B.R. v. State*, 657 So.2d 1184, 1185 (Fla. 1st DCA 1995) ("Although B.R.'s language was frustrating and annoying to the officer, there was no evidence that her screaming was of such a nature as to incite anyone in the area to an immediate breach of the peace."); *L.A.T. v. State*, 650 So.2d 214, 217-18 (Fla. 3d DCA 1995) (holding a " 'fighting words' finding . . . constitutionally unjustified as a matter of law" where "words neither themselves urged the crowd to respond nor actually had that effect").

quoted words with an intent to incite the police officer and perhaps others to violence." *L.J.M.*, 541 So.2d at 1323. *L.J.M.* has no applicability in this case; there is no evidence in this record that would permit an officer to reasonably conclude that Gold's statements were intended to incite the police officers or anyone else to violence. Unlike in *L.J.M.*, Gold did not directly approach the police and had not been arrested the night before by these officers; the police officers could not possibly have believed that Gold would lash out at them in violence or that he was attempting to incite them or any other bystanders to violence. To the extent that the panel construed *L.J.M.* to permit criminal liability where an individual is simply critical of police conduct, even when the expression includes a profane word uttered in a loud voice in the presence of others, that conclusion is in error, and, as shown above, in conflict, not only with federal constitutional principles of free speech, but with the clear law of Florida.

Not surprisingly, the panel's decision in this case also conflicts with the decisions of every other Circuit to address a police officer's entitlement to qualified immunity for arresting an individual for using abusive language. For example, in *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir.1990), the Ninth Circuit held that a police officer was not entitled to qualified immunity for stopping an individual after he insulted the officer. In words that apply equally here, Judge Kozinski explained that plaintiff's insult "represented an expression of disapproval towards a police officer with whom he just had a run-in. As such, it fell squarely within the protective

umbrella of the First Amendment and any action to punish or deter such speech . . . is categorically prohibited by the Constitution." *Id.* at 1378. Nor could the officers complain that these First Amendment principles were not clearly established.

> [G]overment officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. . . . Whether or not officer Aguilar was aware of the fine points of First Amendment law, to the extent he is found to have detained Duran as punishment for the latter's insults, we hold that he ought to have known that he was exercising his authority in violation of well-established constitutional rights.

Id.; see also Knox v. Southwest Airlines, 124 F.3d 1103, 1109 (9th Cir.1997); *Mackinney v. Nielsen,* 69 F.3d 1002, 1007 (9th Cir.1995). *See also Spiller v. City of Texas City, Police Dep't,* 130 F.3d 162, 166 (5th Cir.1997) (holding that police officer was not entitled to a dismissal based on qualified immunity for arresting motorist who told the officer to "move his damn truck"); *Guffey v. Wyatt,* 18 F.3d 869, 871 (10th Cir.1994) (denying qualified immunity to an officer who arrested a referee at a hotly contested high school basketball game after the referee refused the officer's order to call more fouls); *Enlow v. Tishomingo County,* 962 F.2d 501, 509-10 (5th Cir.1992) (upholding denial of qualified immunity to a police officer based on *Hill* but remanding for resolution of factual disputes); *Buffkins v. City of Omaha,* 922 F.2d 465, 472 & n. 16 (8th Cir.1990) (denying qualified immunity where woman called police officer an "asshole"); *Bailey v. Andrews,* 811 F.2d 366, 371 (7th

Cir.1987) (denying qualified immunity to officer who arrested plaintiff for stating "I want my damn dog" and "did you shoot my dog?").

For all the foregoing reasons, I believe that this case should be reheard en banc.